

IN THE
Supreme Court of the United States.

AMERICAN RAILWAY EXPRESS COMPANY,
Petitioner,

—against—

THE COMMONWEALTH OF KENTUCKY,
Respondent.

**MEMORANDUM FILED BY PETITIONER,
PURSUANT TO LEAVE OF COURT.**

This memorandum is filed solely with reference to the case of *Pierce v. United States*, 255 U. S. 398, mentioned by Mr. Justice Brandeis on the argument in this court on January 29th, 1925.

The question asked by Mr. Justice Brandeis was whether that case was not a direct authority against the contention made by the petitioners in the first point of its brief, *i. e.*, that plaintiff's claim against the Adams Express Company for fines recoverable under a penal statute was not a debt at the time of the transfer by the Adams Express Company to the petitioner of its property within the State of Kentucky.

In the *Pierce* case, the Waters Pierce Oil Company was indicted in 1907 for receiving rebates under the Elkins Act. These indictments hung fire until 1914, when the case was tried and Waters Pierce Oil Company was convicted and sentenced to pay a fine of \$14,000. Execution

was issued on the judgment for the fine against the Waters Pierce Oil Company and returned unsatisfied.

Meanwhile, in 1913, the Waters Pierce Oil Company had transferred all its property to the Pierce Oil Corporation, which agreed to assume the "debts, obligations and liabilities" of the Waters Pierce Oil Company. The purchase price which the Waters Pierce Oil Company received from the Pierce Oil Company was paid over to certain trustees, who distributed the same among the stockholders of the Waters Pierce Oil Company. The Government brought an action in the nature of a creditor's bill against the Waters Pierce Oil Company and the Trustees and the three stockholders, among whom the property of the Waters Pierce Oil Company had been distributed. It appears that an action had been originally commenced by the Government against the Pierce Oil Company, which had expressly assumed the "debts, obligations and liabilities" of the Waters Pierce Oil Company, but this action was discontinued.

This Court held that a creditor's bill would lie on the judgment for the fine and affirmed the judgment of the lower court against the Trustees of the Waters Pierce Oil Company and the three stockholders to whom property had been distributed.

We respectfully submit that this case is not direct authority for the proposition that if an action had been brought against the purchasing corporation, the Pierce Oil Company, the Government's claim would have been held to be a debt which it assumed by its agreement. Nor is it

authority for the proposition that in an action brought under the new rule laid down by the Kentucky Court, the state's claim for fines due under a penal statute would make it a creditor of the Adams Express Company at the time the petitioner acquired its Kentucky property. The rule as laid down by the Court of Appeals of Kentucky is that where one corporation purchases from another corporation or partnership all the assets of the selling corporation or partnership within a particular state (the selling corporation retaining, however, large assets in other states), and the purchasing corporation pays for the property so acquired only in stock of such purchasing corporation (but less than a controlling interest in such stock), the purchasing corporation is liable to the extent of the property so acquired to the creditors of the selling corporation in the state where such property was located.

We believe that the courts should be stricter in construing the meaning of the word "creditor" in applying a rule such as is laid down by the Court of Appeals of Kentucky than they would be in applying the ordinary and well established rules of the common law with reference to the assumption of liability by one corporation for the debts of another by reason of express agreement or by an applied agreement arising out of the purchase of the *entire assets* of the selling corporation, in exchange for a *controlling interest* in the stock of the purchasing corporation. Certainly, we believe, that the word "creditor" should be more strictly construed in the application of this new rule of law laid down by the Court of Appeals of Kentucky than where it is applied to a

case of distribution by a corporation of all its assets to its stockholders in actual fraud toward its creditors.

It is significant that in the *Pierce* case this Court thought it relevant to refer specifically to the fact that the stockholders receiving the assets were in the position of volunteers and that they were officers of the corporation, and therefore could not have been ignorant of the Government's claim.

We respectfully submit that the decision in the *Pierce* case is not an authority for the proposition that in the present case the claim of the Commonwealth of Kentucky constituted it a creditor, which would make the American Railway Express Company liable to it to the extent of the assets, received from the Adams Express Company, where it specifically appears that the Adams Express Company was not transferring all its property to the American Railway Express Company, that there was no identity of control, and that the stock issued by the American Railway Express Company for the property of Kentucky was less than one-third of one per cent. of the total issued stock of the American Railway Express Company and possessed an intrinsic book value, irrespective of the property acquired in Kentucky, of over \$99 per share.

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